87-1729

No. 87-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

In 1984, Congress amended the forfeiture provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. (Supp. IV 1986) § 853, to include a "relation back" provision, vesting title to forfeited assets in the government upon commission of the underlying crime. This case presents the following questions:

1. Whether Congress in the 1984 amendments intended to authorize the forfeiture of arm's-length attorney fees paid to a lawyer in good faith by a criminal defendant for the purpose of securing representation against the criminal charges upon which the forfeiture count is based.

2. If the first question is answered in the affirmative, whether the 1984 amendments are unconstitutional under the Sixth Amendment, by impairing the defendant's qualified right to counsel of choice, or under the Fifth Amendment, by destroying the balance of forces between the government and the accused.

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Caplin & Drysdale, Chartered, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App., *infra*, 1a-29a[1]) is reported at 837 F.2d 637. The opinion of the court of appeals panel (App., *infra*, 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (App., *infra*, 81a-92a) is reported at 631 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals *en banc* (App., *infra*, 1a) was entered on January 11, 1988. On February

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[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari.

26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, and the relevant provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. § 853, are set out in a statutory appendix (App., *infra*, 93a-103a).

STATEMENT

1. Congress enacted the Continuing Criminal Enterprise (CCE) statute in 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265, originally codified at 21 U.S.C. (1970 ed.) § 848. Since its enactment, the CCE statute has contained an *in personam* forfeiture penalty that is imposed as a part of the sentence of a defendant convicted of a CCE violation. The forfeiture extends to proceeds of the CCE violation and to any property affording an "interest in" or "source of influence over" the illegal enterprise (21 U.S.C. (Supp. IV 1986) § 853(a)(3)). The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. (Supp. IV 1986) § 1963, contains similar forfeiture provisions.[2]

Congress amended the forfeiture provisions of CCE and RICO in 1984 to enhance the government's ability to prevent defendants from evading the forfeiture penalty by transferring assets before conviction. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 302, 2301, 98

[2] While this case concerns a CCE prosecution, the RICO forfeiture provisions are substantially identical to the CCE forfeiture provisions, and the courts have interpreted them similarly. *See* App., *infra*, 33a n.1.

Stat. 2044, 2192-93 (the 1984 Act), codified at 18 U.S.C. (Supp. IV 1986) § 1963 (RICO) and 21 U.S.C. (Supp. IV 1986) § 853 (CCE). The 1984 Act added a provision, commonly called the "relation back" provision, that vests title to forfeitable assets in the government at the time of the criminal violation. *See* 21 U.S.C. (Supp. IV 1986) § 853(c). A third-party transferee of forfeitable assets can defeat forfeiture by proving at a post-conviction hearing that the transfer was a *bona fide* exchange for value and that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." *Ibid.*; *see* 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Congress also amended the CCE restraining-order provisions to permit the government to obtain an *ex parte* order, based solely on the indictment, restraining a defendant from transferring any asset alleged to be forfeitable. 21 U.S.C. (Supp. IV 1986) § 853(e).

Congress explained that the purpose of the 1984 Act was "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions." S. Rep. 98-225, 98th Cong., 2d Sess. 200-201 (1984). Congress stated that the relation-back provision was aimed at "improper pre-conviction transfers" (*id.* at 196, 197) and at "improper disposition of forfeitable assets" (*id.* at 194). Noting that the 1984 Act "should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property" (*id.* at 201), Congress explained that the exception for good-faith transferees "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions" (*id.* at 209 n.47). Referring to the amended restraining-order provision, the House Report stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt.1, 98th Cong., 2d Sess. 19 n.1 (1984).

2. Caplin & Drysdale, Chartered, was retained by Christopher Reckmeyer in the summer of 1983 in connection with a grand jury investigation in the Eastern District of Virginia (App., *infra*, 4a). At the time Caplin & Drysdale undertook the representation, it believed the investigation to involve possible violations of the criminal tax laws. Eighteen months later, the investigation culminated in an indictment against Reckmeyer and 25 other individuals for 48 counts of tax and drug crimes (App., *infra*, 82a; C.A. App. 48-50[3]).

The indictment, handed down on January 15, 1985, included a CCE count and sought forfeiture of virtually all of Reckmeyer's assets (App., *infra*, 4a). Specifically, the CCE count sought to forfeit "any profits" and any property affording "a source of influence over [the] enterprise, including but not limited to" a long list of assets (C.A. App. 54). That list contained generic descriptions of the assets to be forfeited, such as "any and all possessions" (*id.* at 59) and "any and all personal and/or corporate ownership interest . . . in any monies" (*id.* at 62). The day before the indictment was filed, the government sought and obtained an *ex parte* order restraining the transfer of assets covered by the indictment, specifically including all "currency" of Reckmeyer. App., *infra*, 4a, 82a; C.A. App. 91.

During the investigation preceding Reckmeyer's indictment, Caplin & Drysdale had tendered bills and been paid for its legal services at the standard hourly rates for the attorneys involved. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale $26,445 for services rendered and costs incurred through that date (App., *infra*, 82a; C.A. App. 123). On January 14, 1985, Caplin & Drysdale received two checks from Reckmeyer, each in the amount of $5,000, in partial payment of amounts due on the out-

[3] "C.A. App." refers to the joint appendix filed in the Court of Appeals.

standing bills. These checks were deposited, but they subsequently were returned unpaid to Caplin & Drysdale because of the restraining order (C.A. App. 123, 129-130). On January 25, 1985, just prior to his surrender to authorities, Reckmeyer paid Caplin & Drysdale $25,480 in cash (App., *infra*, 39a). The firm notified the district court of its receipt of these funds, which were then deposited in a separate escrow account pending further order of the court. At Reckmeyer's request, Caplin & Drysdale continued to represent him after the indictment. *Ibid.*

In accordance with Reckmeyer's request, Caplin & Drysdale subsequently filed a motion seeking modification of the restraining order to permit the payment of attorneys fees. App., *infra*, 82a. To meet the trial schedule set by the district court, the firm found it necessary to begin trial preparations before this motion could be decided. On March 14, 1985, the day before the motion was to be heard, Reckmeyer pled guilty to three counts of the 48-count indictment, including the CCE count on which the forfeiture allegations were based. *Ibid.* At the hearing the next day, the district court denied the motion for modification of the restraining order, citing Reckmeyer's guilty plea. The court stated, however, that Caplin & Drysdale could raise the issue of forfeitability of attorneys fees, on its own behalf, in the context of a third-party petition against forfeited assets. Reckmeyer was sentenced on May 17, 1985, to 17 years in prison without parole, and was ordered to forfeit virtually all his assets, including the cash held in escrow and the bank accounts on which the dishonored checks to Caplin & Drysdale had been drawn. *Id.* at 82a-83a.

Caplin & Drysdale filed a claim in post-conviction proceedings under 21 U.S.C. (Supp. IV 1986) § 853(n) to an interest in the forfeited property in the amount of $170,513 (App., *infra*, 5a, 83a), representing unpaid fees and expenses owed to the firm for legal services rendered to

Reckmeyer both before and after his indictment, plus the $25,480 in cash and $10,000 in dishonored checks received for services rendered prior to the indictment. The government conceded the reasonableness and legitimacy of Caplin & Drysdale's fees (C.A. App. 183), but argued that the "relation back" provision vested prior title to Reckmeyer's assets in the government and prevented payment of any fees.

The district court rejected the government's contention and ordered it to pay $170,513 to Caplin & Drysdale out of Reckmeyer's forfeited assets (App., *infra*, 92a). The court found that Caplin & Drysdale "was a good faith provider of services for value" (*id.* at 83a) and held that Congress had not intended the 1984 Act to encompass the forfeiture of *bona fide* attorneys fees. A contrary interpretation of the statute, the district court concluded, would violate a defendant's Sixth Amendment rights by preventing him from retaining counsel of his choice (*id.* at 88a-92a). The interpretation urged by the government, the district court further concluded, would violate the Due Process Clause of the Fifth Amendment by creating conflicts between defense counsel and the criminal defendant that "would undermine the adversary system" (*id.* at 91a). In so holding, the court followed the rulings of other district courts, which similarly had concluded that "attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions." *Id.* at 86a, citing *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

3. A panel of the Fourth Circuit unanimously affirmed, albeit on constitutional rather than statutory grounds. App., *infra*, 41a-77a.[4] While acknowledging that "a central

[4] The instant case was consolidated in the Fourth Circuit for argument with two other cases raising related issues concerning pre-trial restraint of a defendant's use of assets to pay *bona fide* attorneys fees. In *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1985), the district court exempted certain of a defendant's assets from potential forfeiture in order to enable him to pay his attorneys. In *United States v. Harvey*, Cr. No. 85-00224-A (E.D. Va. 1986), the defendant's chosen counsel initially refused to enter an appearance because the government's restraining order prevented payment of attorneys fees; the district court ultimately appointed that law firm to represent the defendant under the Criminal Justice Act. Neither of these other cases was considered by the Fourth Circuit *en banc*.

concern behind the relation-back provisions was to void sham and fraudulent transfers" (*id.* at 49a), the panel concluded that the statutory language was not so narrowly confined; it accordingly ruled that the 1984 Act encompassed attorneys fees, even when paid in good faith and at arm's length. The panel agreed with the district court, however, that this interpretation of the statute rendered it unconstitutional (*id.* at 70a):

> [T]o the extent the Act authorizes freeze orders and forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the [S]ixth [A]mendment right to counsel of choice.

The panel acknowledged that the right to counsel of choice is "qualified" and must be balanced against countervailing government interests (*id.* at 66a-70a). But it concluded that the government's asserted interests—deterrence, preserving property for forfeiture, and depriving convicted persons of their economic power—did not outweigh "the primary right to representation by privately retained counsel of choice" (*id.* at 67a).

4. The Fourth Circuit granted rehearing *en banc* and, by a 7-4 vote, overturned the panel decision on the constitutional issues. The *en banc* court found no need to

consider how the right to counsel of choice is "qualified," stating that this constitutional right "simply does not apply at all in the fee forfeiture context" (App., *infra*, 11a). The majority stated that "[t]he right to counsel of choice belongs only to those with legitimate assets," and it concluded that a criminal defendant should be deemed to have no legitimate assets, even prior to conviction, so long as "the government contests the legal ownership of the assets" (*id.* at 12a). This conclusion was founded on the statute's "relation back" provision, which the majority analyzed as a property-law concept rather than as a punitive element of criminal *in personam* forfeiture. "[I]f [a defendant] has no uncontested assets available for securing private counsel," the majority concluded, the availability of an appointed attorney is sufficient to satisfy his Sixth Amendment rights (*id.* at 14a).

The majority acknowledged that "[f]ee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders" (App., *infra*, 19a). Having failed to discern any constitutional right at issue, however, the majority dismissed these concerns as mere questions of policy properly addressed to Congress (*id.* at 19a-22a). Indeed, the majority asserted that Congress had already discerned a "compelling public interest" in stripping defendants, in advance of trial and conviction, of "the ability to command high-priced legal talent" (*id.* at 21a).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit has decided an important question concerning the impact of the criminal forfeiture penalty on retention of defense counsel in a manner that conflicts with decisions of the Fifth and Second Circuits. Under the Fourth Circuit's *en banc* decision, whenever the government seeks forfeiture under CCE or RICO of all of a defendant's assets, the defendant as a practical matter will be prevented by the indictment alone from hiring defense

counsel of his choice to defend him against the criminal charges that are the basis of the unproven forfeiture claim. This interference with the retention of private counsel in CCE and RICO prosecutions has caused widespread confusion and uncertainty among criminal defense counsel and the courts, as evidenced by the numerous lower court decisions addressing the issue.[5] The issue is of great impor-

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[5] Many district courts have held that the statute must be read to exempt from forfeiture sufficient assets to enable a defendant to retain an attorney to defend the criminal charges. *United States v. Madeoy*, No. 86-0377 (D.D.C. Oct. 2, 1987) (WESTLAW, Allfeds Database); *United States v. Truglio*, 660 F. Supp. 103 (N.D. W. Va. 1987); *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986); *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986); *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985); *see also United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987). Other courts have concluded that the statute does not exempt attorneys fees and that it is not unconstitutional to require a defendant to forfeit assets that would otherwise be paid to an attorney. *United States v. Bailey*, 666 F. Supp. 1275 (E.D. Ark. 1987). *See also In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Payden)*, 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985) (*dictum*), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

The commentators who have addressed the issue have reached similarly diverse conclusions, but none doubts that genuine issues exist. Some conclude the statute should be read to exclude attorneys fees. *See* Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 Stan. L. Rev. 663 (1987); Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1; Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U.L. Rev. 124 (1986). Others conclude that while the broad language of the statute emcompasses attorneys' fees, as so interpreted it is unconstitutional. *See* Note, *Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?*, 62 Notre Dame L. Rev. 734 (1987); Note, *Attorney Fee Forfeiture*, 86 Colum. 1021 (1986); Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 W. Va. L.

tance to the administration of justice and should be resolved promptly by this Court.

1. The 7-4 *en banc* opinion of the Fourth Circuit, which is consistent with a recent 2-1 decision of the Tenth Circuit (*United States v. Nichols*, Nos. 87-1459, 87-1743 (Mar. 10, 1988)), is squarely in conflict with the Fifth Circuit's decisions in *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987), and *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988). The decision below also conflicts, either directly or in fundamental principle, with the Second Circuit's recent 2-1 decision in *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987) (*reh'g granted* Jan. 29, 1988, *argued* Mar. 30, 1988).

The Fifth Circuit concluded in *Thier* that the CCE forfeiture provisions were not intended to prevent the payment of legitimate attorneys fees incurred in the defense

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Rev. 825 (1986). Another group of commentators suggests that additional procedural safeguards should be employed in applying the statutes to bona fide attorneys' fees. *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va. L. Rev. 493 (1986); Fossum, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs?*, 39 Sw. L.J. 1067 (1986); Pate, *Payment of Attorneys' Fees with Potentially Forfeitable Assets*, 22 Crim. L. Bull. 326 (1986); Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 Fordham L. Rev. 1171 (1986); Note, *Forfeitability of Attorney's Fees Traceable as Proceeds from a RICO Violation under the Comprehensive Crime Control Act of 1984*, 32 Wayne L. Rev. 1499 (1986); Comment, *Today's RICO and Your Disappearing Legal Fee*, 15 Cap. U.L. Rev. 59 (1985).

See also Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 U. Mich. J.L. Reform 1199 (1986); Viles, *Criminal Procedure IV: Attorneys' Fees Forfeiture and Subpoenaing Defendants' Attorneys*, 1986 Ann. Surv. Am. Law 335 (1986); Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L. Rev. 747 (1985); Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversarial System?*, 62 Wash. L. Rev. 201 (1987).

of criminal charges, and that a contrary interpretation would violate a defendant's Sixth Amendment rights (801 F.2d at 1470-1475). That conclusion was reached in the context of a pre-trial challenge to an *ex parte* restraining order that barred the defendant from using his assets to employ private counsel. The Fifth Circuit held that such an order can be extended beyond ten days (*see* 21 U.S.C. (Supp. IV 1986) § 853(e)(2)) only if the government prevails at an evidentiary hearing in which the district court considers, among other things, the order's effect on the defendant's ability to retain a lawyer (801 F.2d at 1469, 1474). Even if the government prevails at such a preliminary evidentiary hearing, moreover, the Fifth Circuit found "no indication in the statute or the legislative history that Congress intended to exclude attorneys from bringing a third-party claim for a reasonable attorneys fee against potentially forfeitable assets in a post-conviction hearing" (*id.* at 1474). The court stated that a defendant's attorney may demonstrate at such a post-conviction hearing that "he rendered legitimate services and is entitled to payment from the forfeited assets," and the court emphasized that the attorney's "necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services" (*ibid*).

In *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988), the Fifth Circuit subsequently approved the precise post-conviction procedure for recovering attorneys fees that was outlined in *Thier* and that was followed by petitioner in the instant case. The Fifth Circuit in *Jones* affirmed a district court's modification of the post-conviction forfeiture order to release forfeited assets to pay the legitimate attorneys fees of criminal defense counsel. The court of appeals specifically reaffirmed its holding in *Thier* that " 'an attorney may demonstrate in a post-conviction hearing that he rendered legitimate services and is entitled to

payment from the forfeited assets.'" *Jones*, 837 F.2d at 1335, quoting *Thier*, 801 F.2d at 1474.

The Fourth Circuit's *en banc* decision also conflicts, either directly or in fundamental principle, with the Second Circuit's recent decision in *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987). Although the Second Circuit majority agreed with the Fourth Circuit that a defendant has no constitutional right to pay retained defense counsel out of otherwise forfeitable assets, it held that the 1984 Act violates the Sixth Amendment to the extent it authorizes a restraining order, based solely on an indictment, where the defendant claims that he is unable to retain defense counsel without use of his restrained assets. The Second Circuit ruled (*id.* at 84) that the defendant's Sixth Amendment right to counsel of choice requires the government to demonstrate, at a pretrial evidentiary hearing, that it is likely to prevail on the merits of the underlying criminal charges and that the contested assets are likely to be forfeited upon the defendant's conviction. *Id.* at 83-84. The court ruled (*id.* at 84) that if the government fails to demonstrate likelihood of success on the merits at such a hearing, the government would thereafter be foreclosed by the Sixth Amendment from seeking a post-conviction forfeiture of attorneys fees, even though defense counsel would have been aware of the government's forfeiture allegations and hence would be unable to satisfy the "reasonably without cause to believe" standard of 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). Judge Oakes, in dissent, would have followed the panel opinion of the Fourth Circuit in the instant case and declared the 1984 Act unconstitutional to the extent it applies to prevent the payment of defense counsel out of assets alleged by the government to be forfeitable.

These decisions of the Fifth and Second Circuits cannot be reconciled with the decision below. The Fourth Circuit refused even to consider the respective interests of the defendant and the government, holding that a defendant's

qualified right to counsel of choice "simply does not apply at all in the fee forfeiture context" (App., *infra*, 11a). In contrast to the Fifth and Second Circuits, therefore, the Fourth Circuit has squarely held that the 1984 Act authorizes the forfeiture of attorneys fees and that such forfeiture implicates no rights of a defendant under the Sixth Amendment.

2. The Fourth Circuit's holding to this effect is contrary to a long line of decisions, beginning with this Court's decision in *Powell v. Alabama*, 287 U.S. 45, 53 (1932), which have held that a fundamental component of the Sixth Amendment right to counsel is the right to use one's assets to retain counsel of one's choice to defend against criminal charges. The right is "qualified" by the obvious limitation that a defendant without assets is unable to exercise it. It is qualified further in that certain government interferences with a defendant's choice of counsel have been permitted in the interest of the orderly administration of justice.[6] Whether such interference with the

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[6] For example, the courts have denied continuances where a defendant seeks to change counsel on the eve of trial (*Unger v. Sarafite*, 376 U.S. 575, 589 (1984); *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 612-613 (4th Cir.), *cert. denied*, 106 S. Ct. 3305 (1986); *United States v. Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974)); the courts have refused to permit a defendant to be represented by someone who is not admitted to the bar (*United States v. Schmitt*, 784 F.2d 880, 882 (8th Cir. 1986)); and the courts have refused to permit counsel to represent more than one defendant in a criminal case where conflicts exist between the clients (*United States v. Wheat*, 813 F.2d 1399 (9th Cir.), *cert. granted*, No. 87-4 (Oct. 5, 1987) (*argued* Mar. 2, 1988); *United States v. Flanagan*, 679 F.2d 1072 (3d. Cir. 1982), *rev'd*, 465 U.S. 259 (1984); *United States v. Snyder*, 707 F.2d 139, 145 (5th Cir. 1983); *United States v. Provenzano*, 620 F.2d 985, 1004-1005 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980)). Although these cases have prevented a defendant from choosing a *particular* counsel, none has denied him the opportunity to choose *any* private counsel at all, which is the effect of the Fourth Circuit's ruling here. *Compare, e.g., Matter of Klein*, 776 F.2d 628, 633 (7th Cir. 1985)

right to choice of counsel is permissible has been resolved by the courts after weighing the particular interest in the administration of justice at issue against the extent of the interference with the defendant's opportunity to choose counsel. *See, e.g., United States v. Wheat*, 813 F.2d 1399 (9th Cir.), *cert. granted*, No. 87-4 (Oct. 5, 1987) (*argued*, Mar. 2, 1988); *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Linton v. Perini*, 656 F.2d 207, 210 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Leavitt*, 608 F.2d 1290, 1293 (9th Cir. 1979).[7]

The Fourth Circuit panel opinion properly balanced the competing interests and concluded that the CCE forfeiture provisions are unconstitutional to the extent they prevent the payment of legitimate attorneys fees (App., *infra*, 70a). The panel reasoned (*id.* at 60a-63a) that the right to counsel of choice, albeit qualified, is the core of the Sixth Amendment right to counsel, predating the more recently articulated right to appointed counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)) and the right to effective assistance of counsel (*McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Correctly distinguishing the cases permitting the

(state's rules "diminish somewhat" the available pool of attorneys); *United States v. Burton*, 584 F.2d 485, 492 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (denial of continuance to obtain additional counsel may be permitted where defendant has already retained other attorneys); *United States v. Garrett*, 727 F.2d 1003, 1008 (11th Cir. 1984) (disqualification of counsel upheld where counsel's services "not irreplaceable"), *aff'd on other grounds*, 471 U.S. 773 (1985); *Bedrosian v. Mintz*, 518 F.2d 396, 401 (2d Cir. 1975) (refusal to appoint out-of-state counsel upheld where qualified in-state counsel available).

[7] In *United States v. Wheat*, 813 F.2d 1399 (9th Cir.), *cert. granted*, No. 87-4 (Oct. 5, 1987) (*argued*, Mar. 2, 1988), the Solicitor General has argued that the qualified right to counsel of choice arises under the Fifth rather than under the Sixth Amendment (U.S. Br. 10-14). The Solicitor General nevertheless concedes that the right is of constitutional dimension and that it can be overcome only by the government's demonstration of a substantial countervailing interest.

denial of a defendant's request for a *particular* lawyer, the Fourth Circuit panel recognized that upholding the government's interpretation of the CCE forfeiture provision would deny a defendant the opportunity to hire *any* counsel at all. App., *infra*, 68a. Balancing the government's asserted interests in forfeiting fees against this total denial of a defendant's right to counsel of choice, the panel correctly concluded that the government's interests are paramount only to the extent they track the specific purpose of the "relation back" provision—to prevent sham transfers in the guise of attorneys fees (*id.* at 67a-69a). By permitting the payment of *legitimate* attorneys fees, the panel reasoned, the government's interest in depriving a criminal of the economic benefits of his crime *upon conviction* can be squared with the defendant's right to hire counsel of choice to defend him (*id.* at 67a).

In contrast, the *en banc* majority held that a defendant's Sixth Amendment right to counsel of choice "simply does not apply" to the pre-conviction impact of a government forfeiture claim on the ability to hire defense counsel (App., *infra*, 11a). The majority acknowledged (*id.* at 9a) that the statute "can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture." But the majority nevertheless held the right to counsel of choice to be inapplicable, because it viewed the "relation back" provision of the forfeiture statute as involving a mere question of property law (*id.* at 11a-12a (emphasis in original)):

> Each and every prior case applying the right to counsel of choice has assumed as its starting point that the defendant wished to hire defense counsel with *his own assets*. Here, this assumption is conspicuously absent. The very point of the inclusion of forfeiture in an indictment is the government's assertion that the assets possessed by a defendant are not legally his own, but the fruits of crime in which the law recognizes no ownership rights

> of the defendant. Forfeiture is not an attempt to punish those with legal assets by denying them an attorney; it is an assertion that the defendant does not have the legal assets that entitle him to a right to counsel of choice in the first place.
>
> The fact that the government contests the legal ownership of the assets is crucial.

By treating this case as involving only the practical qualification that a defendant's ability to exercise his right to choice of counsel is limited by his resources, the *en banc* majority ignored the government's role in rendering the defendant's assets unavailable to him. The unavailability of the defendant's assets comes about solely as a result of a prosecutor's allegation, under a federal penal statute, that a defendant has no assets that are not subject to forfeiture. Indeed, the majority's assertion that "the fact that the government contests the assets is crucial" (App., *infra*, 12a) concedes the government's responsibility for the defendant's impecuniousness. The Fourth Circuit justified its result by incorrectly stating that forfeiture is not a penalty (*id.* at 12a). The *en banc* majority's failure to weigh the competing interests of the government and the defendant under the customary Sixth Amendment balancing test is explicable only as the product of its mischaracterization of the case as involving simply a dispute over the ownership of assets in which the government's role is equivalent to that of a private civil litigant in a property contest.

Had the proper balancing test been applied, it would have been clear that the interference with retention of counsel created by the CCE forfeiture provisions does not pass muster under the Sixth Amendment. On one side of the balance, the interference with a defendant's ability to hire counsel is complete—no defendant subject to a forfeiture claim covering all his known assets, such as the claim in this case, will be able to pay or assure payment

of a lawyer and, consequently, he will be unable to retain any private counsel.[8] This total denial of any opportunity to hire counsel has a direct impact on the reliability of the adversary process because it will frequently eliminate the lawyers who have represented the defendant prior to indictment and who are most familiar with the case.

Weighed against this broad deprivation of any opportunity to hire counsel with not-yet-forfeited assets are three governmental interests. The first is the general objective of the CCE and RICO statutes to remove the economic benefit of crime by imposing a criminal forfeiture penalty on convicted persons. The significance of this general objective, however, is severely constrained in the pre-conviction context by the due process prohibition on the imposition of punishment prior to conviction. *See Bell v. Wolfish*, 441 U.S. 520, 535-537 (1979); *United States v. Salerno*, 107 S. Ct. 2095, 2101 (1987). The significance of this general objective is even further diminished when the assets in question, if not forfeited to the government, would be paid to the defendant's lawyer as an arm's-length fee. The assets will then be removed in any event from the convicted person's "economic power base" (S. Rep. 98-225, *supra*, at 191), and the general penal goal of forfeiture will thus be achieved.[9]

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[8] As the panel recognized, the defendant in this case, Christopher Reckmeyer, would not have been represented by retained counsel if the law were not unsettled at the time of his indictment and Caplin & Drysdale had not agreed to contest the applicability of the CCE statute to attorneys fees (App., *infra*, 76a-77a n.11.)

[9] The Fourth Circuit *en banc* suggested a much broader version of the governmental objective discussed in the text, reasoning that Congress intended to punish defendants prior to conviction by prohibiting them from hiring especially qualified lawyers. *See* App., *infra*, 21a. ("Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent."). *Accord United States v. Nichols*, Nos.

The second governmental interest is the one cited by Congress when enacting the relation-back provision—to "close a potential loophole" in earlier law whereby defendants sought to evade forfeiture by sham transactions and other "improper pre-conviction transfers" (S. Rep. 98-225, *supra*, at 196, 197, 200-201). This governmental interest, of course, would support the forfeiture of amounts paid to an attorney fraudulently or in excess of arm's-length norms. But this (concededly substantial) governmental interest does not support the forfeiture of *legitimate* attorneys fees, as the panel below correctly pointed out (*see* App., *infra*, 65a).

The third governmental interest advanced by the Fourth Circuit majority is that of preserving a defendant's assets for possible future forfeiture. *See* App., *infra*, 11a; S. Rep. 98-225, *supra*, at 195-196. The apparent premise of this argument is that the government is entitled to extract a fixed dollar value of assets from a defendant upon conviction, and that this sum will unavoidably be reduced by payments (however legitimate) to lawyers or other persons. But even if one assumes that this premise is correct, what it proves is that the only governmental interest served by forfeiture of attorneys fees is a financial interest, and a marginal one at that. Since the government must provide counsel to a defendant if he is unable to retain private

87-1459, 87-1743 (10th Cir. Mar. 10, 1988), (WESTLAW, CTA10 Database, at screen 47). But this Court has clearly held that substantive due process prohibits the imposition of punishment prior to conviction (*see Bell v. Wolfish*, 441 U.S. at 535-37; *United States v. Salerno*, 107 S. Ct. at 2101), which is precisely the result, as regards employment of retained defense counsel, that the Fourth Circuit seems to have approved here. Moreover, as the Fifth Circuit stated in *Thier*, "the notion that a defendant would commit criminal acts . . . in order to pay a reasonable fee to the attorney he chooses to assist in his defense is sophistry" (801 F.2d at 1475). As the dissent in *Nichols* put it somewhat more colorfully: "equating the ability to raise a defense to a 'benefit' of crime is like considering the right to a jury trial a benefit of being accused of murder" (WESTLAW at screen 64).

counsel, the essential governmental interest reduces to the difference between the amount of money it will cost the government to provide a lawyer (*i.e.*, the cost of a public defender or appointed counsel), and the amount that the defendant's retained counsel would be paid.

The *en banc* majority of the Fourth Circuit, in effect, holds that this marginal increment in the amount of money the government may retain upon conviction is constitutionally superior to a defendant's Sixth Amendment right to counsel of choice. But this Court has never suggested that the government's interest in maximizing a monetary penalty has precedence over a defendant's constitutional rights. As the Fourth Circuit panel concluded, and as the four *en banc* dissenters found, the government's rather modest financial interest does not outweigh a defendant's right to retain *some* private counsel to defend him against the criminal charges.

It must be acknowledged that the *en banc* majority never expressly balanced the government's financial interest against the defendant's Sixth Amendment rights. Instead, the majority adopted the erroneous view that a defendant facing forfeiture charges *has no assets* to pay counsel, and hence that the right to counsel of choice "simply does not apply at all in the fee forfeiture context" (App., *infra*, 11a). By equating the fictive property law concept of the relation-back provision with such "[p]urely private predicaments" as creditors' liens or lack of wealth (*id.* at 13a), the *en banc* majority begged the constitutional question rather than answering it. Judge Phillips, speaking for the four dissenters, aptly put it as follows (*id.* at 27a):

> [T]he ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right [to counsel of choice] must yield here to countervailing governmental

> interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them.

The majority's question-begging is the worse because it disregards the fact that here the legal fiction of the relation-back device is not merely a principle ordering competing property claims, but is a component part of a criminal penalty sought to be imposed on the defendant by the government.

3. Adverting to the constitutional difficulties that we have discussed, the Fifth Circuit in *Thier* and numerous district courts have held that the 1984 Act should be interpreted not to authorize the forfeiture of legitimate attorneys fees paid by a defendant to his counsel. That interpretation of the statute is faithful to its legislative history and conforms to well established rules of statutory construction.

In finding the 1984 Act "unambiguous" in extending to attorneys fees (App., *infra*, 6a), the Fourth Circuit relied on the absence of any express exemption for such fees and on its reading of the statute's "third-party transferee" provision, 21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B). That section states that a third-party transferee of a defendant's assets may defeat forfeiture only if he shows, not only that he was "a bona fide purchaser for value," but also that he was, at the time of the transfer, "reasonably without cause to believe that the property was subject to forfeiture." Since a lawyer representing an indicted defendant will be, of all possible third party transferees, the person least likely to be without such "reasonable cause," the Fourth Circuit concluded that no statutory exemption for attorneys fees exists.

Contrary to the Fourth Circuit's view, the language of the 1984 Act is not without ambiguities, ambiguities that have forced the courts to resort to the Act's legislative

history to fill various statutory ellipses.[10] This legislative history makes clear that Congress did not intend to authorize forfeiture of *bona fide* attorneys fees. Congress repeatedly stated that the 1984 amendments were aimed at "transfers that were not 'arm's-length' transactions" (S. Rep. 98-225, *supra*, at 200-201), at "improper preconviction transfers" (*id.* at 196, 197), at "improper disposition of forfeitable assets" (*id.* at 194), and at "sham or fraudulent transactions" (*id.* at 209 n.47). Congress emphasized that "nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. 98-845 Pt. 1, *supra*, at 19 n.1. Where, as here, Congress has indicated a limited scope for a statute, courts should not reach for the broadest possible construction, particularly when that broad construction gives rise to the very constitutional difficulties that Congress expressed its intent to avoid. The Fifth Circuit in *Thier* thus correctly concluded that the statute should be read to exclude legitimate attorneys fees from its scope, at least until Congress has more clearly indicated its intent to test the limits of what is constitutionally permissible. *See, Boos v. Barry*, 56 U.S.L.W. 4254, 4259 (U.S. Mar. 22, 1988) ("It is well-settled that federal courts have the power to adopt narrowing constructions of federal legislation. . . . Indeed, the

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[10] For example, a lawyer, like many other purveyors of goods and services to a defendant, is a "seller" not a "purchaser" (21 U.S.C. (Supp. IV 1986) § 853(n)(6)(B)), but the Fourth Circuit was able to rectify this apparent drafting oversight by relying on the statute's legislative history. *See* App., *infra*, 45a n.4. Similarly, persons who lend money to a defendant in exchange for a security interest in otherwise forfeitable assets are not literally "purchasers," but the government has conceded that such individuals are covered by section 853(n)(6)(B). *See United States v. Reckmeyer*, 628 F. Supp. 616, 619 (E.D. Va. 1986), *aff'd*, 836 F.2d 200 (4th Cir. 1987). Indeed, some courts have held that unsecured trade creditors may make a claim against forfeited assets as *bona fide* purchasers under the forfeiture provisions. *See United States v. Reckmeyer*, 836 F.2d 200, 205-208 (4th Cir. 1987) (CCE); *United States v. Mageean*, 649 F. Supp. 820, 827-831 (D. Nev. 1986), *aff'd*, 822 F.2d 62 (9th Cir. 1987) (RICO).

federal courts have a duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") *See also Gutknecht v. United States*, 396 U.S. 295, 306-307 (1970); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis J., concurring); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1868).

4. In adopting the government's interpretation of the CCE forfeiture provisions, and by implication the virtually identical RICO forfeiture provisions, the decision below, unless reversed, will permit an unparalleled governmental intrusion into the traditional attorney-client relationship in criminal matters. The Fourth Circuit's decision will result in the elimination of private counsel from many complex criminal proceedings, based solely on the prosecutor's decision about what to charge in the indictment. Indeed, the Fourth Circuit's decision may prevent defendants from being represented by *any* counsel during grand jury investigations. Prospective counsel may be unwilling to take the risk that information he learns about his client's affairs during the investigation will result in his being unable to meet the statute's "reasonably without cause to believe" test with respect to fees paid prior to indictment if the government subsequently seeks forfeiture of those fees. *See United States v. Badalamenti*, 614 F. Supp. at 197.[11]

[11] Faced with inability to secure private counsel, a grand jury target will also be unable to qualify for appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, because he will not yet have been charged with an offense. Despite the fact that an individual is not constitutionally entitled to appointed counsel at the investigatory phase of a case (*Massiah v. United States*, 377 U.S. 201 (1964)), it would seem clear that either the Fifth or Sixth Amendment would bar Congress from prohibiting persons subject to grand jury investigation from retaining legal counsel. But that is precisely the effect of the relation-back provision as construed by the court below.

In those infrequent instances where a lawyer is willing to represent a defendant in the face of the government's forfeiture claims, the CCE statute as construed by the Fourth Circuit creates a direct personal conflict between the attorney's interest in his fee and his client's best defense. The lawyer in such circumstances will have a disincentive to learn facts about his client's conduct that might be relevant to the defense, but that might inhibit him from demonstrating in post-conviction proceedings that he was at the relevant time "reasonably without cause to believe" that the fee was subject to forfeiture. The conflict between a lawyer's desire to retain his fee and his obligation faithfully to represent his client could similarly result in a reluctance to pursue certain defense strategies, or in recommendations in the context of plea negotiations colored by counsel's judgment of which action is most likely to permit the payment of his fee.[12]

[12] The district court below aptly summarized these difficulties as follows (App., *infra*, 91a-92a):

> The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. . . . Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences.

See also United States v. Badalamenti, 614 F. Supp. at 196-197; *United States v. Rogers*, 602 F. Supp. at 1349.

The significance of these conflicts of interest is not blunted by the Fourth Circuit's facile assurances that defense counsel will invariably rise above them. *See* App., *infra*, 18a-19a. A lawyer is ethically prohibited from entering into an attorney-client relationship, especially in a criminal case, where he has an actual personal conflict with his client; it is irrelevant whether he in fact abuses the conflict. *See* ABA Model Rules of Professional Conduct ("Model Rules"), Rules 1.7(b), 1.8(j); ABA Model Code of Professional Responsibility ("Model Code"), DR 5-103(A), 5-105(A). The conflicts created by forfeiture of attorneys fees closely resemble those created by contingent fees, which are ethically prohibited in criminal cases. Model Rules, Rule 1.5(d)(2); Model Code, DR 2-106(C). Such conflicts could easily rise to the constitutional level of ineffective assistance of counsel, spawning additional litigation affecting the validity of criminal convictions and pleas.[13]

The Fourth Circuit's decision would also work a fundamental change in the historic relationship between a defendant, his counsel, and the prosecutor. For almost 200 years prior to the 1984 forfeiture amendments, defense counsel could play his role in the adversary system without fear that he would himself be the target of government action except for conduct manifestly illegal, such as witness tampering, jury tampering, subornation of perjury, or the like. Now, the mere receipt of payment for services rendered in good faith may be prevented or attacked by the government. The prosecutor's considerable discretion in determining the scope of the indictment and the property subject to forfeiture in effect places defense counsel at the mercy of his adversary. One does not have to posit

[13] This Court has held that actual conflicts of interest violate the Sixth Amendment guarantee of effective assistance of counsel, with no requirement that a defendant show prejudice from the conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60, 76 (1942).

malicious abuses of government power to recognize the significant shift in the balance of forces between prosecution and defense wrought by the Fourth Circuit's decision.[14] The creation of such an imbalance of powers between prosecution and defense is in itself a violation of the Due Process Clause of the Fifth Amendment. *See Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser").

Finally, the impact of a decision upholding the government's position in this case would be widespread and pervasive. Although most current litigation concerns defendants charged with drug-related crimes under the CCE statute,[15] the principle established in these cases will extend through the RICO statute to a variety of white collar criminal prosecutions.[16] The impact of the Fourth

[14] A ruling vindicating the government's position here would extend well beyond the fee forfeiture context. Under 18 U.S.C. (Supp. IV 1986) § 1957, enacted as part of the money-laundering statutes in 1986, an attorney could be prosecuted for receiving payment of a fee from what turns out to be a criminally derived source. The government may prosecute on a "willful blindness" theory to demonstrate an attorney's knowledge of the criminal derivation of his fee, thus placing him at risk, not only of losing his fee, but also of criminal prosecution for knowledge acquired in performing legal services for his client. If there is no constitutional protection for pre-conviction payment of legitimate attorneys fees, as the Fourth Circuit has concluded, there would be no limitation on the criminalization of usual and heretofore unobjectionable receipt of legitimate fees in the course of a criminal representation.

[15] While disclaiming any reliance on the fact that the defendant in this case was charged with drug offenses (App., *infra*, 15a), the *en banc* majority opinion is replete with references to "drug merchants," the "illegal drug trade" and "drug kingpins." *See id.* at 16a, 19a, 21a.

[16] The RICO forfeiture provision can produce draconian results, since it renders an entire enterprise subject to forfeiture if the government charges that it was used in a relatively isolated pattern of racketeering activity. For example, in a recent RICO prosecution in the Eastern District of Virginia, defendants convicted of selling $105 worth of por-

Circuit's decision would expand even further as Congress adds to the list of forfeitable offenses: a bill now pending in Congress, for example, would make simple mail and wire fraud a forfeitable offense and other legislative initiatives under consideration would make the proceeds of tax crimes forfeitable under the money-laundering statutes.[17] The Fourth Circuit's decision, unless reversed, will thus cause many of the most complex white collar criminal prosecutions to devolve to court-appointed attorneys and to the public defender system, since private counsel will refuse to take the risk that their legitimately earned fees will subsequently be forfeited to the government.

The unprecedented alteration of the criminal justice system caused by the prospect of attorney fee forfeiture has created much controversy and confusion in the lower courts and in the legal profession. No appellate court has yet upheld the constitutionality and applicability of the statute to attorneys fees unanimously, and two appellate courts have taken the issue *en banc*. Numerous bar groups have expressed concern about the impact of fee forfeiture on the adversary system. Because of the conflicting decisions from the appellate and district courts, virtually all criminal defenses in forfeiture cases under CCE and RICO are now in a state of uncertainty, with the possibility of attendant injury to the rights of criminal defendants. These factors strongly counsel in favor of prompt review and resolution of the issues by this Court.

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nographic material in violation of RICO forfeited their entire interest in their legitimate videocassette business valued at over $1 million. *United States v. Pryba*, No. 87-00208-A (E.D. Va. 1988). A prospective defense counsel must be concerned, therefore, not only with whether assets used to pay his fees are criminally derived, but also with whether otherwise legitimate assets have become tainted by their connection, however remote, to criminal activity.

[17] *See* H.R. 2898, 100th Cong., 1st Sess. (1987); Draft Bill, Minor and Technical Criminal Law Amendments Act of 1988, § 149, Senate Committee on the Judiciary, 100th Cong., 2d Sess., (Jan. 7, 1988).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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